UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Applications of: SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION and BLOOMBERG L.P. for Review of Actions Taken by Various National Securities Exchanges	Admin. Proc. File Nos. 3-15351; 3-15364; 3-15600; 3-15774; 3-16204; 3-16320; 3-16330; 3-16356; 3-16423; 3-16526; 3-16685; 3-16724; 3-16793; 3-17040; 3-17066; 3-17105; 3-17138; 3-17176; 3-17208; 3-17244; 3-17331; 3-17663; 3-17702; 3-17787; 3-17841; 3-17877; 3-18002; 3-18010; 3-18057; 3-18094; 3-18144; 3-18145; 3-18248; 3-18286; 3-18310; 3-18345; 3-18362; 3-18383; 3-18441; 3-18680

MOTION FOR RECONSIDERATION OF ORDER REMANDING CHALLENGES TO VARIOUS RULE CHANGES AND DIRECTING EXCHANGES TO DEVELOP PROCEDURES

Pursuant to Rule 470(a) of the Commission's Rules of Practice, The Nasdaq Stock Market LLC, Nasdaq PHLX LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC (collectively, "Nasdaq") respectfully request that the Commission reconsider its order, entered on October 16, 2018, remanding to Nasdaq more than 130 fee challenges filed by the Securities Industry and Financial Markets Association ("SIFMA") and Bloomberg L.P. ("Bloomberg") and directing Nasdaq to develop or identify procedures for assessing whether the challenged fees should be set aside under Section 19(f) of the Securities Exchange Act ("Exchange Act"). *See In re Applications of SIFMA & Bloomberg*, Exchange Act

Rel. No. 84433 (Oct. 16, 2018) ("Remand Order"), available at https://www.sec.gov/litigation/opinions/2018/34-84433.pdf; *see also* 17 C.F.R. § 201.470(a).

As set forth in the accompanying Memorandum of Law, the Commission should reconsider its Remand Order because, among other reasons, it lacks jurisdiction over SIFMA's and Bloomberg's Section 19(d) applications challenging Nasdaq's market-data fees, Nasdaq's Commission-approved rules do not provide for the procedures the Remand Order contemplates, and the Commission has no authority to order Nasdaq to promulgate new rules adopting procedures for assessing whether its challenged market-data fees must be set aside under Section 19(f) of the Exchange Act. Although the Exchanges do not believe that they are required to file a motion for reconsideration before seeking judicial review of the Remand Order, *see* 5 U.S.C. § 704, they are doing so to afford the Commission an opportunity to correct its erroneous ruling.

Nasdaq respectfully requests that the Commission reconsider its Remand Order and either dismiss the applications or retain jurisdiction over the applications and resolve them itself without a remand.

Respectfully submitted,

Jeffrey S. Davis
John Yetter
Nasdaq, Inc.
805 King Farm Boulevard
Rockville, MD 20850

Eugene Scalia
Amir C. Tayrani
Jacob T. Spencer
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
escalia@gibsondunn.com

Stephen D. Susman
Jacob W. Buchdahl
Susman Godfrey LLP
560 Lexington Avenue, 15th Floor
New York, NY 10022
(212) 336-8330
ssusman@susmangodfrey.com

Dated: October 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2018, I caused a copy of the foregoing document to be served on the parties listed below via First Class Mail, except as otherwise provided.

Michael D. Warden
Carter G. Phillips
Kevin Campion
Kevin P. Garvey
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

W. Hardy Callcott
SIDLEY AUSTIN LLP
555 California Street
San Francisco, CA 94104

Benjamin Beaton
SQUIRE PATTON BOGGS
2550 M Street, N.W.
Washington, D.C. 20037

David Whitcomb
General Counsel
CHICAGO STOCK EXCHANGE, INC.
440 South LaSalle Street
Chicago, IL 60605

Marcia E. Asquith
Corporate Secretary
FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.
1735 K Street, N.W.
Washington, D.C. 20006

Barbara Comly
General Counsel and Secretary
MIAMI INTERNATIONAL SECURITIES EXCHANGE LLC
7 Roszel Road, 5th Floor
Princeton, NJ 08540

Douglas W. Henkin
Seth T. Taube
BAKER BOTTS LLP
30 Rockefeller Plaza
New York, NY 10112

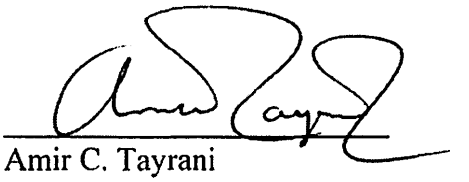
Patrick Sexton
Executive Vice President, General Counsel, and Corporate Secretary
CHICAGO BOARD OPTIONS EXCHANGE, INC.
C2 OPTIONS EXCHANGE, INC.
CBOE HOLDINGS, INC.
CBOE BZX EXCHANGE, INC.
CBOE BYX EXCHANGE, INC.
CBOE EDGX EXCHANGE, INC.
CBOE EDGA EXCHANGE, INC.
CBOE C2 EXCHANGE, INC.
CBOE EXCHANGE, INC.
400 South LaSalle Street
Chicago, IL 60605

Elizabeth King
Corporate Secretary
NEW YORK STOCK EXCHANGE LLC
NYSE MKT LLC
NYSE ARCA
NYSE AMERICAN LLC
NYSE NATIONAL, INC.
11 Wall Street
New York, NY 10005

Lisa J. Fall
President, Chief Legal Officer, and Corporate Secretary
BOX OPTIONS EXCHANGE LLC
101 Arch Street, Suite 610
Boston, MA 02110

Brent J. Fields
Secretary
U.S. SECURITIES AND EXCHANGE COMMISSION
100 F Street, N.E.
Washington, D.C. 20549
(via facsimile and hand delivery)

Dated: October 24, 2018



Amir C. Tayrani
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
atayrani@gibsondunn.com

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The Nasdaq Stock Market LLC, Nasdaq PHLX LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC (collectively, "Nasdaq") respectfully request that the Securities and Exchange Commission (the "Commission") reconsider its order, entered on October 16, 2018, remanding to Nasdaq more than 130 fee challenges filed by the Securities Industry and Financial Markets Association ("SIFMA") and Bloomberg L.P. ("Bloomberg") and directing Nasdaq to develop or identify procedures for assessing whether the challenged fees should be set aside under Section 19(f) of the Securities Exchange Act ("Exchange Act"). *See In re Applications of SIFMA & Bloomberg*, Exchange Act Rel. No. 84433 (Oct. 16, 2018) ("Remand Order"), available at https://www.sec.gov/litigation/opinions/2018/34-84433.pdf.

BACKGROUND

On October 16, 2018, the Commission issued its decision in *In re Application of SIFMA*, Exchange Act Rel. No. 84432 (Oct. 16, 2018) ("SIFMA Opinion"), available at https://www.sec.gov/litigation/opinions/2018/34-84432.pdf. In that proceeding, SIFMA challenged certain fees that The Nasdaq Stock Market LLC and NYSE Arca, Inc., charged for their depth-of-book market data as improper prohibitions or limitations on access to their services under Section 19(d) of the Exchange Act. *See* 15 U.S.C. § 78s(d)(1), (2). Rejecting the initial decision of its own Chief Administrative Law Judge, the Commission ruled that Nasdaq had failed to carry its burden of showing that the market-data fees at issue were fair and reasonable, and set aside the fees under Section 19(f) of the Exchange Act.

While that proceeding was pending before the Commission, SIFMA and Bloomberg filed an additional sixty-one denial-of-access applications under Section 19(d) of the Exchange Act, challenging more than 400 other market-data fee filings by Nasdaq and other exchanges. The

Commission took no action on any of those applications—some of which have been pending for more than five years—before issuing the SIFMA Opinion.

The same day that the Commission released its SIFMA Opinion, and without affording the parties an opportunity for briefing or argument, the Commission issued its Remand Order, which remands "to the respective exchanges the challenges to the rule changes that are the subject of the other applications for review that have been filed." Remand Order at *2. The Remand Order does not set aside any of those rule changes or express any view on the merits of the challenges. *Id.* Instead, it instructs the respective exchanges to "consider the impact of the SIFMA Decision, as well as SIFMA's and Bloomberg's contentions that the challenged rule changes should be set aside under Exchange Act Section 19." *Id.* The Remand Order also requires the exchanges to "develop or identify fair procedures for assessing the challenged rule changes as potential denials or limitations of access to services." *Id.* The exchanges are required to provide "written notice" to the Commission that they have "developed or identified" procedures "that comply with Exchange Act Section 6(b)(7)"—which must include notice and an opportunity to be heard, the development of a record, and a written decision—within six months of the Remand Order. *Id.* at *2. And the exchanges are required to complete "the process of applying the procedures" to the hundreds of challenged rule changes within one year, *id.*, even though the Commission required more than five years to resolve just two fee challenges, *see* SIFMA Opinion at *12.[1]

As a result, Nasdaq has until April 16, 2019, to develop entirely new procedures for assessing whether the more than 130 Nasdaq fee filings challenged by SIFMA and Bloomberg

[1] The Remand Order imposes similar requirements on National Market System plan participants for addressing pending challenges to plan amendments. Remand Order at *3-4. That portion of the Remand Order is not at issue in this motion.

are consistent with the Exchange Act, and has until October 16, 2019, to complete its review of the challenged rules under those new procedures.

ARGUMENT

The Commission should reconsider the Remand Order and either dismiss the pending denial-of-access applications or retain jurisdiction and resolve them itself without a remand.

As an initial matter, as Nasdaq has previously argued in connection with the SIFMA Opinion, the Commission lacks jurisdiction to hear challenges to immediately effective fee filings under Section 19(d) of the Exchange Act because an exchange's market-data fees do not constitute prohibitions or limitations on access to the exchange's services.[2]

In addition, like Section 19(d) of the Exchange Act, Nasdaq's existing rules regarding limitations or prohibitions on access to its services do not provide for challenges to market-data fees. Those rules were explicitly approved by the Commission as consistent with the Exchange Act. The Commission would have withheld approval if challenges to market-data fees were within the scope of Section 19(d) because Nasdaq's rules do not provide a procedure for assessing whether fees should be set aside as limitations or prohibitions on access.

Nor does the Commission have authority to compel Nasdaq to promulgate new rules for assessing fee challenges. Section 19 of the Exchange Act provides for self-regulatory organizations ("SROs") to adopt their own rules and to submit them to the Commission, which

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[2] *See Brief of The Nasdaq Stock Market LLC; NASDAQ OMX PHLX; and EDGX Exchange, Inc. In Response To Commission's Order Regarding Procedures To Be Adopted In Proceedings, In re Application of SIFMA*, Admin. Proc. File No. 3-15351 (Aug. 30, 2013); *Brief of The Nasdaq Stock Market LLC; NASDAQ OMX PHLX; and EDGX Exchange, Inc. In Response To Brief of Applicant SIFMA, In re Application of SIFMA*, Admin. Proc. File No. 3-15351 (Sept. 20, 2013); *Brief of The Nasdaq Stock Market LLC In Response To SIFMA's Opening Brief Regarding Satisfaction of Jurisdictional Requirements, In re Application of SIFMA*, Admin. Proc. File No. 3-15350 (Aug. 18, 2014).

can approve or disapprove those rules after providing notice and an opportunity for public comment. Section 19 also authorizes the Commission to amend an SRO's rules through notice-and-comment rulemaking. But nothing in Section 19, or any other provision of the Exchange Act, authorizes the Commission to compel SROs to promulgate new rules.

Finally, the Commission acted arbitrarily and capriciously, and contrary to basic principles of procedural fairness, by entering the Remand Order without providing any opportunity for the parties to brief whether the Commission's action would be lawful and appropriate. Nasdaq therefore has had no prior opportunity to call the Commission's attention to the serious legal deficiencies in the Remand Order. Before requiring Nasdaq to expend substantial amounts of time and resources in developing new procedures and applying those procedures to more than 130 pending fee challenges, the Commission should allow full briefing and argument.

I. Market-Data Fees Cannot Constitute A Prohibition Or Limitation On Access Under Section 19(d).

The Commission lacks jurisdiction over each denial-of-access application filed by SIFMA and Bloomberg because the text and purpose of Section 19(d), as well as the structure of the Exchange Act as a whole, establish that an exchange's market-data fees cannot constitute a prohibition or limitation on access to the exchange's services.

Section 19(d) authorizes the Commission to review an action taken by an SRO that:

i. imposes any final disciplinary sanction on any member or person associated with a member;

ii. denies membership or participation to any applicant;

iii. prohibits or limits any person in respect to access to services offered by such organization or member thereof; or

iv. bars any person from becoming associated with a member.

In re Application of Allen Douglas Sec., Inc., Exchange Act Rel. No. 50513, 2004 WL 2297414, at *2 (Oct. 12, 2004); *see also* 15 U.S.C. § 78s(d) (authorizing Commission review where an SRO "prohibits or limits any person in respect to access to services"). If an application under Section 19(d) challenges action that does not fall within one of these four enumerated categories, the Commission must dismiss the application. *See In re Application of Larry A. Saylor*, Exchange Act Rel. No. 51949, 2005 WL 1560275, at *2-3 (June 30, 2005).

The categories of SRO conduct listed in Section 19(d)—all of which involve conduct directed at a specific member or applicant—make clear that Congress intended Section 19(d) to govern "quasi-adjudicatory" proceedings by SROs. *See In re Application of Tower Trading, L.P.*, Exchange Act Rel. No. 47537, 2003 WL 1339179, at *3 (Mar. 19, 2003) ("Congress intended . . . Section 19(d), 'to encompass all final quasi-adjudicatory actions[.]'"). "[A]n adjudicatory determination [is] a particularized inquiry which will determine the legal rights and liabilities of a specific individual." *Gray Panthers v. Schweiker*, 652 F.2d 146, 155 n.18 (D.C. Cir. 1980); *see also Landsdowne On Potomac Homeowners Ass'n v. Openband At Landsdowne, LLC*, 713 F.3d 187, 201 (4th Cir. 2013) (an act is "adjudicatory" when it "resolve[s] disputes among specific individuals in specific cases," as opposed to "affect[ing] the rights of broad classes of unspecified individuals"); *Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 559 (7th Cir. 2012) (same). Congress's intent to authorize review of quasi-adjudicatory proceedings under Section 19(d) is confirmed by the provision's legislative history. *See* S. Rep. No. 94-75, 1975 WL 12347, at *26 (1975) ("Section 19(d) would require the self-regulatory organizations to file with the appropriate regulatory agency . . . notice of all final quasi-adjudicatory actions."); *id.* (referring to a "limitation or prohibition of a person's access to requested services" as a "quasi-adjudicatory" proceeding); *id.* at *131 (same).

Nasdaq raised these same jurisdictional objections in the proceeding that culminated in the SIFMA Opinion. In its May 2014 order rejecting Nasdaq's jurisdictional arguments, the Commission emphasized that Section 19(d) does not use the phrase "quasi-adjudicatory action." *In re Application of SIFMA*, Exchange Act Rel. No. 72182, 2014 WL 1998525, at *18 (May 16, 2014) ("Jurisdictional Order"). The statutory context confirms, however, that the phrase "prohibits or limits any person in respect to access to services" does not extend beyond quasi-adjudicatory action. 15 U.S.C. § 78s(d)(1). All of the surrounding phrases in Section 19(d)—"impos[ing] any final disciplinary sanction," "den[ying] membership or participation," and "bar[ring] any person from becoming associated"—unambiguously refer to quasi-adjudicatory action, and all appear under the heading "notice of disciplinary action taken by [SRO]." *Id.* Settled principles of statutory construction make clear that "prohibit[ing] or limit[ing] . . . access to services" should be read to cover the same type of quasi-adjudicatory action as the three phrases that surround it. *See United States v. Williams*, 553 U.S. 285, 294 (2008) ("[T]he commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated.").

The Commission's past practice illustrates the types of quasi-adjudicatory actions the Commission is authorized to review in Section 19(d) proceedings. For example, in *In re Application of William J. Higgins*, Exchange Act Rel. No. 24429, 1987 WL 757509 (May 6, 1987), the Commission reviewed NYSE's decision denying the request of two members to install telephones allowing them direct access to their non-member customers from the NYSE trading floor. *Id.* at *1. After concluding that "the denial of Applicants' requests is a limitation of access to services," the Commission set aside NYSE's action and ordered it to permit installation of the requested telephone links. *Id.* at *14.

Similarly, in *Tower Trading, L.P.*, the Commission reviewed a decision by the Chicago Board Options Exchange ("CBOE") to terminate a firm's appointment as a Designated Primary Market-Maker because the firm had allegedly failed to meet minimum performance standards. 2003 WL 1339179. The Commission concluded that "CBOE's action amounted to a final, quasi-adjudicatory SRO action, and [the firm's] loss of its guaranteed participation fundamentally altered its access to services offered by CBOE." *Id.* at *5. The Commission therefore ruled that jurisdiction existed under Section 19(d) and set aside CBOE's action. *Id.* at *5, *7.

The hundreds of market-data fee filings that SIFMA and Bloomberg seek to challenge in their denial-of-access applications are far different from the quasi-adjudicatory actions challenged in *Higgins* and *Tower Trading*. Unlike the SRO actions in those proceedings, which were targeted at *specific* members, the immediately effective fee filings at issue here are *generally applicable* SRO rules that apply across the board to all market-data customers. Those SRO rules bear no resemblance to the "final disciplinary sanctions," denials of "membership" and "association," and similar quasi-adjudicatory actions that the Commission has reviewed in previous Section 19(d) proceedings. *Allen Douglas Sec.*, 2004 WL 2297414, at *2.[3]

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[3] In the Jurisdictional Order, the Commission cited *In re Bloomberg, L.P.*, Exchange Act Rel. No. 49076, 2004 WL 67566 (Jan. 14, 2004), for the proposition that market-data fees are "within the scope of Section 19(d)." Jurisdictional Order, 2014 WL 1998525, at *16. In that proceeding, however, Bloomberg did not challenge a fee, but rather a quasi-adjudicatory SRO action limiting its ability to display market data. *In re Bloomberg*, 2004 WL 67566, at *2. The Commission also cited three orders involving Section 11A of the Exchange Act. *See* Jurisdictional Order, 2014 WL 1998525, at *8 n.72 (citing *In re Application of the Cincinnati Stock Exchange*, Exchange Act Rel. No. 43316, 2000 WL 1363274 (Sept. 21, 2000); *Institutional Networks Corp. & Nat'l Ass'n of Secs. Dealers, Inc.*, Exchange Act Rel. No. 20874, 1984 WL 472209 (Apr. 17, 1984); and *In re Bunker Ramo Corp.*, Exchange Act Rel. No. 15372, 1978 WL 171128 (Nov. 29, 1978)). But those matters arose in the core-data setting, not the proprietary-data setting. In addition, no court has ever considered or endorsed the Commission's application of denial-of-access procedures to core-data fees, which rests on the erroneous conclusion that a securities information processor's core-data fees can constitute prohibitions or limitations on "access to

The structure of the Exchange Act confirms that Section 19(d) proceedings cannot be used to challenge exchanges' immediately effective rule changes establishing or modifying market-data fees. The procedure governing exchanges' "[p]roposed rule changes" is set forth in Section 19(b) of the Act, which explicitly applies to immediately effective rule changes "establishing or changing a due, fee, or other charge." 15 U.S.C. § 78s(b)(3)(A); *see also id.* § 78s(c) (authorizing the Commission to "abrogate, add to, and delete from" SRO rules). Unlike Section 19(d), which subjects SRO action to review by the Commission "upon application by *any person* aggrieved thereby," *id.* § 78s(d)(2) (emphasis added), Section 19(b) permits only *the Commission* to institute proceedings to review an SRO's immediately effective fee filing, *id.* § 78s(b)(3)(C). If Congress had intended to give private parties the power to compel Commission review of every immediately effective SRO fee filing, it would have included that procedure in Section 19(b), the provision that expressly addresses immediately effective rule changes establishing or changing a fee, not Section 19(d), which involves quasi-adjudicatory actions. SIFMA and Bloomberg should not be permitted to use Section 19(d) as an end-run around the Exchange Act's carefully calibrated procedures.

Moreover, in contrast to Section 19(b), Sections 19(d)—and the related procedures set forth in Section 19(f)—are a remarkably poor fit for review of immediately effective SRO fee filings. First, Section 19(d) requires an SRO to "promptly file notice" with the Commission when it prohibits or limits access to a service. 15 U.S.C. § 78s(d)(1). That procedure makes sense in the context of a quasi-adjudicatory action that, for instance, terminates a firm's status as a market-maker, *see Tower Trading*, 2003 WL 1339179, but it makes no sense in the context of

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services" under Section 11A(b)(5) of the Exchange Act. *See Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 801 F.2d 1415, 1416 (D.C. Cir. 1986) (reviewing *Institutional Networks* order without considering question of Commission's jurisdiction).

SRO fees because it would be impossible for an SRO to know, at the time it established a fee, whether some subset of consumers might claim that the fee is so high as to constitute a purported denial of access. Second, while Section 19(f) contemplates review based on "the record before the [SRO]," 15 U.S.C. § 78s(f)—which an SRO generally produces when it undertakes quasi-adjudicatory action, *see, e.g.*, *Higgins*, 1987 WL 757509—SROs do not typically create a record in conjunction with establishing and changing a fee (except to the extent that an SRO elects to submit supporting documentation to the Commission). Indeed, SROs could not create the type of record contemplated by the Remand Order when establishing a market-data fee. The Commission dismissed this point in its Jurisdictional Order, reasoning that certain filings prepared and submitted by the SROs "effectively provide a record as contemplated by Section 19(f)." Jurisdictional Order, 2014 WL 1998525, at *11. But the Remand Order directs Nasdaq to "develop a record" on remand to assess whether each of its challenged fees should be set aside under Section 19(f), Remand Order at *2, and thereby acknowledges that Nasdaq did *not* create a record suitable for a Section 19(d) proceeding when initially promulgating those immediately effective rules.

Third, as the Commission recognized in the SIFMA Opinion, neither Section 19(d) nor Section 19(f) authorizes the Commission to set a specific fee for an SRO product, which further underscores that Congress did not design these procedures for the review of SRO fees. At most, the Commission can "grant [a] person access to services offered by the self-regulatory organization," 15 U.S.C. § 78s(f); *see, e.g.*, *Higgins*, 1987 WL 757509, at *14, which the Commission construed in the SIFMA Opinion as affording it the authority to set aside an immediately effective fee filing, *see* SIFMA Opinion at *52-53. But the Commission cannot establish the *terms* under which access must be provided, which means there is no mechanism

under Section 19(d) or Section 19(f) for the Commission to alter allegedly unreasonable fees. In fact, it would violate the Exchange Act's prohibition on prices that are "unfairly discriminatory" and not "fair and reasonable" for a consumer to receive a special price merely because it disagreed with the price that its competitors willingly paid for a product. 15 U.S.C. §§ 78f(b)(5); 78k-1(c)(1)(D); 78s(b)(3)(C).

Finally, permitting consumers to challenge market-data fees through Section 19(d) would undermine Congress's objective in the Dodd-Frank amendments to streamline the procedures governing the introduction of new market-data products. Prior to 2010, it was sometimes difficult for SROs to bring new products to market quickly. In response to concerns about the Commission's pace in processing rule changes, and to promote regulatory "efficien[cy] and responsive[ness]," S. Rep. No. 111-176, 2010 WL 1796592, at *106 (2010), Congress amended the Exchange Act in 2010 by expanding the types of SRO rule changes that can take effect upon filing to include non-member fees. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 916, 124 Stat. 1376, 1833-36 (2010). This amendment reflects Congress's view that such fee filings are sufficiently routine that they should take effect without prior notice and comment. *See* 15 U.S.C. § 78s(b)(3)(A).

Requiring the Commission to engage in extensive review of SRO fees in Section 19(d) proceedings, and requiring exchanges to provide detailed justification for every pricing change, would generate the precise inefficiencies and burdens that Congress sought to eliminate in Dodd-Frank. Review of SRO fees under Section 19(d) would inevitably interfere with market-based competition and divert the Commission's finite resources from more pressing matters.

For all these reasons, an exchange's market-data fees cannot constitute a prohibition or limitation on access to its services under Section 19(d), and a person who objects to the fees that

an exchange charges for its market-data products is not a "person aggrieved" within the meaning of Section 19(d). The Commission should therefore dismiss all of SIFMA's and Bloomberg's denial-of-access applications challenging Nasdaq's market-data fee filings under Section 19(d). *See Saylor*, 2005 WL 1560275, at *1.

II. The Commission Approved Nasdaq's Existing Rules Even Though They Do Not Contemplate Review Of Market-Data Fees As Potential Prohibitions Or Limitations On Access.

The Remand Order directs Nasdaq to "develop or identify fair procedures for assessing the challenged rule changes as potential denials or limitations of access to services" and to provide written notice of those procedures to the Commission within six months. Remand Order at *2. The fact that Nasdaq does not already have procedures in place for reviewing market-data fees as potential prohibitions or limitations on access confirms that Section 19(d) does not encompass challenges to market-data fees.

The Commission approved Nasdaq's existing rules setting out procedures for determining whether there has been a prohibition or limitation on access to its services. In so doing, the Commission determined that those rules fully comply with the Exchange Act. *See* 15 U.S.C. § 78s(b)(1)(C) (Commission may approve SRO's rules only "if it finds" that the rules are "consistent with the requirements" of the Act); *see also In re Application of The Nasdaq Stock Market LLC*, Exchange Act Rel. No. 34-53128 (Jan. 13, 2006) (approving Nasdaq's original rules relating to membership discipline and oversight as "consistent with Section 6 of the Exchange Act"), available at https://www.sec.gov/litigation/opinions/34-53128.pdf. Yet, Nasdaq's existing rules provide no mechanism for challenging market-data fees as potential prohibitions or limitations on access.

The rules of The Nasdaq Stock Market, for example, state that the exchange will provide written notice upon a finding that a member "does not meet the prerequisites for access to

services offered by Nasdaq" or "cannot be permitted to continue to have access to services offered by Nasdaq." Nasdaq Stock Market Rule 9555(a)(2). Those conditions are plainly inapplicable to market-data products, which are available to anyone willing to pay the applicable fees. Similarly, The Nasdaq Stock Market's rules authorize a member who receives notice of action contemplated by the exchange to request a hearing and to "set forth with specificity any and all defenses to the Nasdaq action." Nasdaq Stock Market Rule 9555(c). While that type of hearing makes sense in the context of an actual denial of access to services—such as a decision to discipline a member—it would be entirely unsuited to a customer's challenge to Nasdaq's market-data fees. The rules of the other Nasdaq-affiliated exchanges are to similar effect. None of them establishes a procedure for contesting the fees that the exchanges charge for their market-data products.

The Commission nevertheless approved those rules and, until now, has never so much as hinted that the rules were deficient because they failed to provide a mechanism for challenging Nasdaq's market-data fees. The Commission's conclusion that Nasdaq's existing rules are consistent with the Exchange Act is further confirmation that market-data fees cannot constitute a prohibition or limitation on access under Section 19(d).

The Remand Order directing Nasdaq to develop procedures assessing whether its fees constitute prohibitions or limitations on access represents a sharp, unacknowledged departure from the Commission's prior, longstanding interpretation of the Exchange Act. The Commission's about-face is not only inconsistent with Section 19(d), *see supra* Part I, but also arbitrary and capricious because agencies have an obligation to acknowledge when they change position and to provide a reasoned explanation for doing so. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation

for its action would ordinarily demand that it display awareness that it *is* changing position."). In issuing the Remand Order, the Commission failed to disclose that it was abandoning its prior position that exchanges' rules need not provide procedures for assessing whether market-data fees should be set aside under Section 19(f). That unacknowledged, unreasoned change in position is arbitrary and capricious.

III. The Commission Has No Authority To Compel Nasdaq To Develop The Procedures The Remand Order Contemplates.

Because Nasdaq cannot possibly "identif[y]" any existing rules "that are tailored to the challenges brought by SIFMA and Bloomberg," the Remand Order effectively requires Nasdaq to engage in an expedited rulemaking process to promulgate new rules "for assessing the challenged rule changes as potential denials or limitations of access to services." Remand Order at *2. But nothing in Section 19 of the Exchange Act, which sets forth a detailed framework governing the Commission's authority over SROs' rulemaking, authorizes the Commission to compel an SRO to engage in rulemaking. *See* 15 U.S.C. § 78s(b), (c).

Section 19 specifies two distinct procedures for changing an SRO's rules. First, if an SRO wants to change its own rules, it may do so by filing proposed rule changes with the Commission, along with "a concise general statement of the basis and purpose" for the changes. 15 U.S.C. § 78s(b)(1). Unless the SRO has designated the rule change immediately effective under Section 19(b)(3)(A), *id.* § 78s(b)(3)(A), the Commission must then institute a notice-and-comment process and decide whether to approve or disapprove the change. *Id.* § 78s(b)(1)-(2). Nothing in Section 19(b) authorizes the Commission to compel an SRO to propose changes to its rules.

Second, if the Commission desires to amend an SRO's rules, it may do so through its own rulemaking process under Section 19(c). *See* 15 U.S.C. § 78s(c) ("The Commission, by

rule, may abrogate, add to, and delete from . . . the rules of a[n SRO] . . . as the Commission deems necessary or appropriate . . . ."). To amend an SRO's rules, the Commission must publish "the text of the proposed amendment" and its reasons in the Federal Register, and then permit public comment. *Id.* § 78s(c)(1)-(2). Like Section 19(b), nothing in Section 19(c) authorizes the Commission to direct an SRO to promulgate changes to its rules.

Accordingly, if the Commission wishes to amend an SRO's rules, it must do so itself, using the procedures Congress established in Section 19(c). Yet, the Remand Order purports to direct Nasdaq to adopt specific changes to its rules by establishing a mechanism for assessing whether market-data fees constitute a prohibition or limitation on access. Nasdaq has not proposed—and does not wish to adopt—procedures for assessing SIFMA's and Bloomberg's denial-of-access applications. And the Commission has not instituted notice-and-comment rulemaking to amend Nasdaq's rules. By using the adjudicatory process in a setting where rulemaking is required, the Commission is impermissibly circumventing the congressionally imposed constraints on its rulemaking authority, including its obligation to consider whether "the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f); *see also Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (the Commission's "failure to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation makes promulgation of the rule arbitrary and capricious and not in accordance with law") (internal quotation marks omitted). Indeed, in light of the substantial burdens that the Remand Order will impose on Nasdaq—which will be required to adopt new procedures, develop a record, and issue written decisions in more than 130 pending fee challenges in the next year—it is clear that the lost-efficiency costs of the Remand Order far outweigh its benefits.

Not surprisingly, the Remand Order fails to cite any statute or regulation that would permit the Commission to compel Nasdaq to engage in rulemaking—let alone on the expedited basis contemplated by the Order. Instead, the Remand Order cites two inapposite matters involving the Depository Trust Company ("DTC"), a registered clearing agency. *See* Remand Order at *2 n.3 (citing *In re Int'l Power Grp., Ltd.*, Exchange Act Rel. No. 66611, 2012 WL 892229, at *8 (Mar. 15, 2012); *In re Atlantis Internet Grp. Corp.*, Exchange Act Rel. No. 75168, 2015 WL 3643461, at *6 n.21 (June 12, 2015)). In March 2012, the Commission expressed its belief that DTC "should adopt procedures" that would apply uniformly in future cases of the same type. *Int'l Power Grp.*, 2012 WL 892229, at *8. Three years later, the Commission reiterated that same belief. *Atlantis Internet*, 2015 WL 3643461, at *6 n.21. But in neither order did the Commission purport to *require* DTC to adopt particular procedures, which the Commission surely would have done after three years of delay if it thought it had the authority to do so.[4]

Moreover, even if the Commission had authority to compel Nasdaq to engage in rulemaking, the rules contemplated by the Remand Order are inconsistent with the Exchange Act and the text and purpose of Dodd-Frank. The Commission failed to identify any language in Section 19 of the Exchange Act—or any other provision of the Act—that permits the agency to outsource its adjudicatory functions under Sections 19(d) and 19(f) to an SRO. Indeed, Section

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[4] The Commission appears to have expressed its hopes that DTC would adopt new procedures because the Commission lacked authority under Section 19(c) to amend DTC's procedures through its own notice-and-comment rulemaking. *See* 15 U.S.C. § 78s(c) (authority to amend does not apply to "a registered clearing agency"). The fact that the Commission possesses the authority to amend Nasdaq's rules under Section 19(c) makes the DTC orders particularly inapposite here because, even if the Commission could compel rulemaking when it lacks the authority to amend the underlying rules itself, it has no basis for resorting to that extra-statutory power where Section 19(c) is available.

19(f) requires "the appropriate regulatory agency" (i.e., the Commission)—not the SRO that allegedly prohibited or limited access to its services—to provide "notice and opportunity for hearing." 15 U.S.C. § 78s(f). By directing Nasdaq to provide the notice and hearing that Congress required the Commission itself to provide, the Commission has violated Section 19(f) of the Exchange Act (assuming arguendo that Sections 19(d) and (f) could be construed as applying to fee challenges).

In addition, as previously explained, Congress intended in Dodd-Frank to streamline the procedures governing the introduction of new market-data products by authorizing exchanges to establish market-data fees through immediately effective rule filings. *See supra* Part I. Requiring Nasdaq to provide customers with notice and an opportunity to be heard regarding its market-data fees, develop a record, and issue a written decision explaining whether those fees should be set aside under Section 19(f) is flatly at odds with the efficient procedure that Congress sought to establish in Dodd-Frank.

Because the Commission lacks authority to require Nasdaq to promulgate new rules—and because the rules contemplated by the Remand Order are inconsistent with the Exchange Act and Dodd-Frank—the Remand Order is arbitrary, capricious, and not in accordance with law. *See* 5 U.S.C. § 706.

IV. The Remand Order Improperly Denied Nasdaq An Opportunity To Be Heard.

Finally, the Commission acted arbitrarily and capriciously, and disregarded fundamental principles of procedural fairness, because it did not give the parties any notice that it was considering ordering a remand, or an opportunity to raise objections to that procedure, before it issued the Remand Order.

The Commission issued the Remand Order on the same day as the SIFMA Opinion, without asking the parties to submit their views on how it should resolve the more than sixty

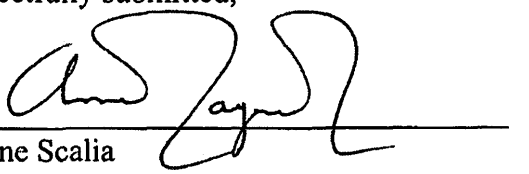
other pending denial-of-access applications filed by SIFMA and Bloomberg. This summary action was procedurally improper and fundamentally unfair because it denied Nasdaq the opportunity to be heard and to raise its arguments regarding the serious deficiencies in the Remand Order. *See LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."); *see also* 15 U.S.C. § 78s(f) (guaranteeing parties "notice and opportunity for hearing" before the Commission rules upon a Section 19(d) application). Instead of taking this precipitous action, the Commission should have instructed the parties to these Section 19(d) proceedings—some of which have been pending for more than five years without any Commission action—to file briefs regarding its proposed remand procedure. And in light of the absence of any record in these proceedings, as well as the significant practical burdens that the Remand Order imposes on Nasdaq and the other exchanges, the Commission should have heard oral argument to aid its decision-making process and ensure full and fair consideration of the parties' views. The briefing and argument would have enabled the Commission to render a fully informed decision that, unlike the Remand Order, is consistent with the Exchange Act, the Commission's rules, and the Administrative Procedure Act.

Accordingly, at a bare minimum, the Commission should reconsider its Remand Order and set a briefing and argument schedule to allow the parties a full opportunity to be heard.

CONCLUSION

The Exchanges respectfully request that the Commission reconsider its Remand Order and either dismiss the applications or retain jurisdiction over the applications and resolve them itself without a remand.

Respectfully submitted,



Eugene Scalia
Amir C. Tayrani
Jacob T. Spencer
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
escalia@gibsondunn.com

Stephen D. Susman
Jacob W. Buchdahl
Susman Godfrey LLP
560 Lexington Avenue, 15th Floor
New York, NY 10022
(212) 336-8330
ssusman@susmangodfrey.com

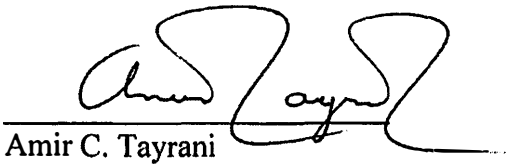
Jeffrey S. Davis
John Yetter
Nasdaq, Inc.
805 King Farm Boulevard
Rockville, MD 20850

Dated: October 24, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion for reconsideration, together with the memorandum in support of the motion, complies with the length limitation set forth in Commission Rule of Practice 154(c) and contains 5,626 words, exclusive of pages containing the table of contents and table of authorities. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare the motion and memorandum.

Dated: October 24, 2018



Amir C. Tayrani
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
escalia@gibsondunn.com

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2018, I caused a copy of the foregoing document to be served on the parties listed below via First Class Mail, except as otherwise provided.

Michael D. Warden
Carter G. Phillips
Kevin Campion
Kevin P. Garvey
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

W. Hardy Callcott
SIDLEY AUSTIN LLP
555 California Street
San Francisco, CA 94104

Benjamin Beaton
SQUIRE PATTON BOGGS
2550 M Street, N.W.
Washington, D.C. 20037

David Whitcomb
General Counsel
CHICAGO STOCK EXCHANGE, INC.
440 South LaSalle Street
Chicago, IL 60605

Marcia E. Asquith
Corporate Secretary
FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.
1735 K Street, N.W.
Washington, D.C. 20006

Barbara Comly
General Counsel and Secretary
MIAMI INTERNATIONAL SECURITIES EXCHANGE LLC
7 Roszel Road, 5th Floor
Princeton, NJ 08540

Douglas W. Henkin
Seth T. Taube
BAKER BOTTS LLP
30 Rockefeller Plaza
New York, NY 10112

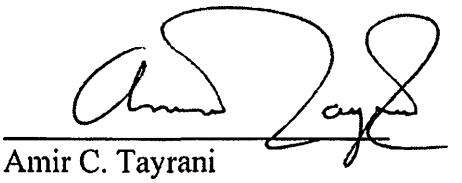
Patrick Sexton
Executive Vice President, General Counsel, and Corporate Secretary
CHICAGO BOARD OPTIONS EXCHANGE, INC.
C2 OPTIONS EXCHANGE, INC.
CBOE HOLDINGS, INC.
CBOE BZX EXCHANGE, INC.
CBOE BYX EXCHANGE, INC.
CBOE EDGX EXCHANGE, INC.
CBOE EDGA EXCHANGE, INC.
CBOE C2 EXCHANGE, INC.
CBOE EXCHANGE, INC.
400 South LaSalle Street
Chicago, IL 60605

Elizabeth King
Corporate Secretary
NEW YORK STOCK EXCHANGE LLC
NYSE MKT LLC
NYSE ARCA
NYSE AMERICAN LLC
NYSE NATIONAL, INC.
11 Wall Street
New York, NY 10005

Lisa J. Fall
President, Chief Legal Officer, and Corporate Secretary
BOX OPTIONS EXCHANGE LLC
101 Arch Street, Suite 610
Boston, MA 02110

Brent J. Fields
Secretary
U.S. SECURITIES AND EXCHANGE
COMMISSION
100 F Street, N.E.
Washington, D.C. 20549
(via facsimile and hand delivery)

Dated: October 24, 2018



Amir C. Tayrani
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
atayrani@gibsondunn.com